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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

REPLY BRIEF OF PETITIONER.

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I.

EXCLUDING PETITIONER'S DEFENSE THAT RESPONDENT'S INJURIES WERE DUE TO HIS VOLUNTARILY ELECTING TO EXCHANGE A SAFE FOR AN UNSAFE PLACE TO WORK.

Respondent's brief attempts to justify the Court's exclusion of the rule requiring him to "precede" the movement over the crossing, on the ground that its purpose of protecting traffic was sufficiently satisfied in his previously walking over the crossing on his way to the car and seeing that no traffic was approaching. That is to say that the rule *permitted* respondent to perform his duty of protecting the crossing from on top of the car.

Even according to that interpretation, the rule was at least evidence that respondent could properly have discharged his duty from a safe position on the ground at the

crossing, and that his remaining on the car was wholly *unnecessary*. It would thus tend to support a finding, either by the Court as a matter of law, or at least by the jury as a matter of fact, that respondent's injuries were due to his unnecessary election to be in a place of *obvious* danger, on a car backed through drifted snow, in a loading yard, where debris was scattered, oblivious to the peril of derailment. It was entitled to consideration on that ground, instead of rejection on the irrelevant ground that its violation did not cause the derailment.

Moreover, the defense referred to was entitled to consideration entirely apart from this rule.

II.

AUTHORIZING THE JURY TO AWARD DAMAGES TO RESPONDENT FOR INJURIES CAUSED BY AN UNSAFE CONDITION IN REMEDYING WHICH HE WAS ENGAGED.

Respondent's brief does not deny that the charge permitted the jury to return a verdict for respondent even if it found that his injuries were caused by snow in removing which, through flanging, he was participating. The brief attempts to justify the charge by asserting that respondent was *not* engaged in a flanging operation, emphasizing the obvious fact that the "flangers" were not functioning during the backward movement and characterizing it as a purely "switching" movement. Petitioner's contention was that respondent was engaged in a flanging operation, in view of the fact that the sole and only purpose of the backward movement in which he was taking part by protecting the crossing was to enable the locomotive to come forward and remove the snow. Respondent's argument overlooks the

point that it was not for counsel to decide as between those conflicting contentions.

Respondent's brief also represents this error in the Court's charge as being of no importance by implying in this connection that ice over the rails *unquestionably* caused the derailment. Elsewhere, however, the brief recognizes that "the main controversy at the trial was the question of whether there *was* ice over the rails" (p. 8). There was ample evidence to support a finding that snow alone caused the derailment.

Our complaint is that the charge permitted the jury to return a verdict for respondent regardless of the above questions, thus imposing on petitioner a liability non-existent in law if they were determined in its favor. That complaint is not disposed of by assertions and assumptions of counsel wrongly implying that no such questions existed.

As for the assertion that there was no contention at the trial that respondent was engaged in making a dangerous place safe, we reply that an exception was taken to that portion of the charge which permitted a verdict for him regardless of the nature of his work (Our Brief, p. 6).

III.

PERMITTING THE JURY TO FIND PETITIONER NEGLIGENT AS TO THE CONDITION OF THE TRACK WITHOUT FINDING THAT IT FAILED TO EXERCISE ORDINARY CARE AND PRUDENCE IN THAT RESPECT.

Seriously misleading is the treatment of this point in respondent's brief. In purporting to quote "the portion of the charge particularly complained of" the brief (pp. 17, 18) suppresses the paragraph which was quoted and particular-

ly complained of at the middle of page 18 of our brief and on the following page. That paragraph was the *very basis* of our complaint that the Court charged the jury that petitioner could be found negligent as to the condition of the track without making such finding contingent on any failure of petitioner to use *ordinary care and prudence* to keep the track in proper condition. By suppressing that paragraph respondent's brief gives color to its incorrect representation of our point as a mere complaint that the word "reasonably" was omitted before the word "safe" elsewhere in the charge.

Respondent's brief then proceeds to represent any inaccuracy in this part of the charge as unimportant, on the ground that it was unquestionable that the track was in a dangerous condition because of "ice and snow." Here the brief perpetuates the confusion between ice and snow as the cause of the derailment. But, in another place (p. 8) it recognizes that the main question at the trial was "whether there *was* ice over the rails." If there was no ice over the rails, and if the derailment was caused by snow about to be removed by "flanging" with proper instruments, then petitioner's negligence would be far from obvious. If the jury had been properly instructed to test petitioner's alleged negligence by the standard of *ordinary care and prudence* it might have found it free from negligence.

IV.

ALLOWING JUDGMENT AGAINST PETITIONER TO BE BASED ON A VERDICT CORRUPTED BY PASSION AND PREJUDICE.

The astonishing assertion in respondent's brief that there was *"nothing prejudicial"* in the argument of counsel emphasizes the need for a writ of certiorari to establish that

the type of "argument" quoted in our brief (p. 21) constitutes an appeal to prejudice which will not be tolerated as a means of securing verdicts under this Act. Respondent's brief emphasizes that the Minnesota Supreme Court declared that the settled practice of objecting and taking exceptions at the trial should not be departed from. But it was not a mere question of objecting to misconduct which might or might not have influenced the verdict.

The Court did not hold that failure to object prevented granting relief where the verdict was *actually influenced* by prejudice. On the contrary, it reduced the damages because it found that this verdict was so influenced. That disproves the assertion in respondent's brief that the matter of prejudice may not be considered in this Court because it could not be raised in the Supreme Court of Minnesota on account of the alleged waiver in not objecting.

Petitioner's complaint is that, because of the passion and prejudice which the Supreme Court found to have influenced the verdict, it never had a fair and impartial trial of the disputed question as to its liability.

Respectfully submitted,

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December, 1930.